

FILE NO. 11-101457 LU

Exhibit Y-2 BSRE Motion to
Stay Hearing dated 6-24-20

SNOHOMISH COUNTY HEARING EXAMINER

BSRE POINT WELLS, LP,)	
)	NO. 11-101457 LU
Appellant)	
)	BSRE POINT WELLS, LP'S
v.)	MOTION TO STAY HEARING
)	
SNOHOMISH COUNTY PLANNING AND)	
DEVELOPMENT SERVICES,)	
)	
Respondent.)	

BSRE Point Wells, LP ("BSRE") hereby submits this Motion requesting a stay of the hearing tentatively scheduled for November of 2020 in order to allow the Court of Appeals to rule on the two legal issues that are outstanding.

I. INTRODUCTION

In May of 2018, Snohomish County (the "County") recommended denial of the land use applications¹ (the "Land Use Applications") filed by BSRE for the development of an urban center at property it owns in unincorporated Snohomish County ("Point Wells") consistent with the land use regulations in effect on the date of submittal (February 14, 2011). The County relied on SCC 30.61.220 to recommend denial of the Land Use Applications without preparation of an environmental impact statement (an "EIS") based on eight (8) alleged areas of substantial conflict between the Land Use Applications and the Snohomish County Code (the "Code"). After a hearing, the Hearing Examiner issued two decisions which had the effect of terminating the Land

¹ File numbers 11-01457 LU/VAR, 11-101461 SM, 11-101464 RC, 11-101008 LDA, and 11-101007 SP (collectively, the "Land Use Applications"). Exhibits A-1 – A-3, A-6, and A-11–A-27.

1 Use Applications without the preparation of an EIS: The Decision Granting in Part and Denying
2 in Part BSRE's Motion for Reconsideration and Clarification (the "Reconsideration Decision")
3 {Exhibit R-3) and the Amended Decision Denying Extension and Denying Applications Without
4 Environmental Impact Statement (the "Denial Decision") (Exhibit R-4). The Denial Decision held
5 that there were six issues of substantial conflict (the "Conflict Areas") between the Land Use
6 Applications and the Code. The Hearing Examiner's decisions were timely appealed to the
7 Snohomish County Council, which held a closed-record appeal hearing on October 3, 2018. The
8 Snohomish County Council issued its written decision on October 9, 2018, largely affirming the
9 Hearing Examiner's decision (the "Council Decision"). Exhibit S-17. BSRE timely appealed the
10 Council Decision to the King County Superior Court, which held oral arguments on May 10, 2019.
11 The King County Superior Court issued its decision on June 18, 2019 (the "Superior Court
12 Decision"). Exhibit U-1. In the Superior Court Decision, the Superior Court refused to issue any
13 legal interpretations on the Conflict Areas found by the Hearing Examiner, but it did hold that
14 BSRE was entitled to submit revised Land Use Applications by no later than December 18, 2019.
15 *Id.*

16 BSRE timely appealed the Superior Court Decision to the Court of Appeals on July 31,
17 2019. BSRE also submitted revised Land Use Applications to the County on December 12 and
18 16, 2019. Exhibits V-1–V-19.

19 The Court of Appeals briefing by BSRE, the County and the City of Shoreline was
20 completed on February 12, 2020. The appeal before the Court of Appeals involves two questions
21 of statutory interpretation (the "Issues"). The first issue relates to whether a residential setback
22 ordinance applies to the development contemplated by the Land Use Applications and the second
23 issue relates to whether BSRE is entitled to build buildings up to 180 feet high based on proximity
24 to a high capacity transit station.
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1 The County is now seeking dismissal of BSRE's the Land Use Applications, alleging four
2 substantial conflicts (the "Revised Conflict Areas")² between the Land Use Applications and the
3 Code. Two of the four Revised Conflict Areas are directly related to the Issues which are on appeal
4 before the Court of Appeals. BSRE asserts that a hearing on the County's recommendation of
5 denial is premature where the two legal Issues have yet to be resolved and the Court of Appeals'
6 ruling could significantly alter the scope of the hearing needed before the Hearing Examiner.

7 **II. FACTUAL BACKGROUND**

8 **A. Description of the Project.**

9 The Snohomish County Council in 2009 and 2010 revised its comprehensive plan, adopted
10 Chapter 30.34A SCC (the "Urban Center Code") and designated Point Wells as an Urban Center.
11 Exhibit O-3. These combined actions satisfied, at least in part, the County's obligation pursuant
12 to the Growth Management Act to plan for the accommodation of future population growth within
13 unincorporated portions of the County. *Id.* The designation of Point Wells as an Urban Center
14 largely satisfied the County's state-mandated obligation to accommodate its density allocation
15 obligation. *Id.*

16 Following the County's designation of the Site as an Urban Center, BSRE's predecessor
17 submitted a complete Urban Center Development Application (and other related supporting
18 applications, collectively, the "Land Use Applications") for the development of a mixed-use Urban
19 Center including approximately 3,000 residential units, approximately 10,000 square feet of
20 commercial space and a large public access beach. *Id.*

21 **B. BSRE's Development and Land Use Applications.**

22 BSRE has been working with the County on submitting and revising its applications to
23 develop Point Wells as an Urban Center since 2011. *Id.* Throughout the pendency of the
24 permitting process, BSRE has now spent approximately nine years and more than \$10 million in
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26 ² The Revised Conflict Areas include four of the original Conflict Areas, but the County has acknowledged
27 that two of the Conflict Areas have now been resolved. Namely, the County is no longer alleging a conflict with the
Innovative Development Design and with the Ordinary High Water Mark buffer.

1 pursuing approval of the Land Use Applications.

2 In April of 2018, after working collaboratively with BSRE for years on reviewing the Land
3 Use Applications and beginning the EIS, the County abruptly and without explanation actively
4 began the highly unusual process of terminating BSRE's Land Use Applications prior to
5 completion of the EIS. Exhibit N-1.

6 PDS's termination decision was first conveyed by correspondence dated January 9, 2018,
7 from Principal Planner/Project Manager Paul MacCready to BSRE's land use counsel Gary Huff.
8 Exhibit K-33. As reflected in this letter (the "January 2018 Letter"), PDS determined, despite its
9 prior representations to the contrary, that *as of the date of that letter*, the Land Use Applications,
10 *as they then existed* could not be approved under the Code and that there was no longer time to
11 revise the Land Use Applications. *Id.* PDS thereby began the process outlined in SCC 30.61.220
12 to terminate BSRE's forthcoming revised submittal without preparation of an EIS. Nonetheless,
13 PDS in effect invited BSRE to continue to work on its plan revisions and submit them to the
14 Hearing Examiner for consideration. *Id.*; Exhibit K-40.

15 BSRE diligently completed further analysis, revised its plans and fully responded to the
16 matters previously raised by the County. *See* Exhibits A-28–A-40 (collectively, the "April 2018
17 Revisions"). Following receipt of the April 2018 Revisions, the County issued a Supplemental
18 Staff Recommendation on May 9, 2018 (the "May 2018 Recommendation," Exhibit N-2), which
19 was based on an admittedly incomplete review of the April 2018 Revisions. This May 2018
20 Recommendation recommended that the Hearing Examiner deny the Land Use Applications
21 because of eight alleged substantial conflicts with the Code in the Land Use Applications.

22 **C. The Hearing Examiner.**

23 BSRE and PDS participated in an extensive hearing between May 16, 2018 and May 24,
24 2018 regarding PDS's recommendation to deny BSRE's Land Use Applications due to several
25 alleged substantial conflicts between the Land Use Applications and the Code.
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1 The Hearing Examiner issued the Denial Decision on August 3, 2018, in which it ruled
2 that the Land Use Applications were in substantial conflict with the Code in six areas (the “Conflict
3 Areas”): (1) application of a residential zoning setback; (2) building height allowances based on
4 access to high capacity transit; (3) application of shoreline setback requirements; (4) landslide
5 regulations impacting the proposed secondary road; (5) landslide regulations impacting the Upper
6 Plaza (the entrance to Point Wells); and (6) the use of Innovative Development Design. Exhibit R-
7 4. The Hearing Examiner, in its Reconsideration Decision, held that the Denial Decision was made
8 without prejudice. Exhibit A-3.

9 BSRE timely submitted its appeals, first to the County Council and then to the King County
10 Superior Court. The King County Superior Court issued the Superior Court Decision on June 18,
11 2019. In the Superior Court Decision, the Superior Court found that BSRE was entitled to submit
12 revised applications within six months, pursuant to SCC 30.34A.180(2)(f) [2007]. However, the
13 Superior Court failed to issue any decision regarding critical code interpretation questions related
14 to the Conflict Areas identified by the Hearing Examiner.

15 **D. Court of Appeals.**

16 Because BSRE had the right to submit revised Land Use Applications prior to December
17 18, 2019 (the “Reactivation Deadline”), it was critical that BSRE obtain a ruling on two legal
18 interpretation questions which had been raised in the underlying actions, but which remained
19 unanswered. These two legal issues have a tremendous impact on the design of the proposed
20 development at Point Wells: (1) the building height allowances based on adjacency to a high
21 capacity transit route; and (2) whether the residential zoning setback applies to any portion of Point
22 Wells (collectively, the “Issues”). BSRE thus timely appealed the Superior Court Decision to the
23 Court of Appeals, requesting a determination only on the two Issues. As of February 12, 2020,
24 the parties have completed their briefing in this appeal and are now awaiting a response from the
25 Court of Appeals.
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1 **E. Reactivation of the Land Use Applications.**

2 After receiving the Superior Court Decision, BSRE’s consultants spent six months
3 preparing the revised Land Use Applications in order to submit them prior to the Reactivation
4 Deadline. Given its tight timeline, BSRE had to submit the revisions prior to having a final ruling
5 on the Issues. The County has continued to treat the King County Superior Court’s silence on the
6 Issues as acceptance of the County’s position and as a binding interpretation of the two applicable
7 statutory provisions. BSRE maintains that the ruling on the Issues was erroneous, directly harming
8 BSRE’s property rights and ability to develop Point Wells.

9 **F. County’s Recent Actions.**

10 After BSRE submitted its revised Land Use Applications in December of 2019, the County
11 failed to issue any response until May 27, 2020, when BSRE received the County’s Supplemental
12 Staff Recommendation #2, stating that the County was again seeking denial of the Land Use
13 Applications without preparation of the EIS under SCC 30.61.220. The County now alleges four
14 areas of substantial conflict (the “Revised Conflict Areas”): (1) failure to document feasibility and
15 code compliance of second access road; (2) failure to document evidence for access to high
16 capacity transit for building heights over 90 feet and failure to demonstrate compliance with the
17 decision criteria for a variance from SCC 30.34A.040(1); (3) failure to provide appropriate
18 building setbacks for tall buildings from lower density zones and failure to demonstrate
19 compliance with the decision criteria for a variance from SCC 30.34A.040(2)(a); and (4) failure
20 to comply with code provisions regarding critical areas, including geologically hazardous areas.
21 Two of the four Revised Conflict Areas identified by the County (issues 2 and 3 listed above) are
22 the exact same issues that are on appeal before the Court of Appeals.³

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26 ³ The variance requests submitted with those two identified issues (issues 2 and 3 listed above) were only
27 submitted as a “belt and suspenders” approach while the Court of Appeals matter was pending.

III. LEGAL ARGUMENT

A. The Hearing Examiner Has Discretion to Grant Stay.

The Snohomish County Hearing Examiner Rules of Procedure (the “Rules of Procedure”) grant the Hearing Examiner significant discretion to address situations as they arise. For example, where there is no specific rule governing a specific situation, the Rules of Procedure state: “[I]n the event that an unanticipated situation arises which does not lend itself to the full, literal compliance with a Rule, the Examiner reserves the right to exercise discretion to address such circumstances.” Rules of Procedure 1.7. Further, the Rules of Procedure themselves encourage the Hearing Examiner to serve the interests of efficiency. *See, e.g.*, Rules of Procedure 3.3(d) (“Where the interests of efficiency would be served”); Rules of Procedure 5.5(e) (“The Examiner also reserves the right to vary from the normal sequence of events in order to ensure due process and/or for convenience or efficiency.”). The Code also grants the Hearing Examiner authority and discretion to act in a way that best administers justice. SCC 2.02.090 states, “The examiner shall have the power to adopt and amend rules governing the scheduling and conduct of hearings and other procedural matters related to the duties of his or her office.”

The Code places no time restriction or statute of limitations on the Hearing Examiner’s authority under SCC 30.61.220. The Hearing Examiner will still be able to rule on the County’s request for denial after the Court of Appeals issues its ruling. Thus, the Hearing Examiner has the discretion to act in order to ensure efficiency, such as by ordering a stay.

B. A Stay Would Further Interests of Efficiency and Preserve Resources.

A stay would best facilitate the Hearing Examiner’s interest in efficiency and preservation of resources. “The Supreme Court has recognized that a court’s power to stay proceedings is incidental to the power inherent in every court to control the disposition on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Here, the Hearing Examiner should exercise its discretion and quasi-judicial (SCC 2.02.020) powers to order a stay in order allow for the economy of time, effort and resources.

1 A stay would best allow for a final and accurate resolution of this matter. The County has
2 requested denial of the Land Use Applications on four grounds. Two of those grounds are the
3 exact issues on appeal before the Court of Appeals. Thus, the determination of the Court of
4 Appeals matter will necessarily have a direct impact on the hearing before the Hearing Examiner.

5 If a stay is granted and the Court of Appeals rules on the Issues in BSRE's favor, then the
6 hearing before the Hearing Examiner would be significantly different. The pending legal
7 interpretation Issues would no longer be able to be deemed to be in substantial conflict with the
8 Code, and the issues to be addressed at the hearing would be reduced by half. On the other hand,
9 if the Court of Appeals finds that the County's interpretation of the Issues is correct, then BSRE
10 would need to address the County's comments on the Issues and submit briefing and revised
11 application materials on those two items. This would vastly change the preparation BSRE needs
12 to do before the hearing and would also vastly change the number of consultants that would need
13 to be retained (and the scope of work to be done by those consultants) in order to prepare for the
14 hearing.

15 On the other hand, if the hearing before the Hearing Examiner proceeds in November
16 before the Court of Appeals has issued its ruling on the Issues, then the parties may waste time and
17 resources arguing over conflicts that do not exist. Further, without knowing how the Court of
18 Appeals will rule, BSRE is unable to determine whether the project must be significantly
19 redesigned or if, for example, the buildings can be constructed up to 180 feet tall because of their
20 adjacency to a high capacity transit route. This means that BSRE must defend the variance
21 requests and provide additional consultant work in support of the variance requests, despite the
22 fact that the variance requests may not be necessary in the first place. This will be a significant
23 burden on BSRE, which will have to engage and pay for the consultants to prepare this work before
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1 the November hearing. It is BSRE's position that it should be permitted to revise the plans once
2 the Court of Appeals issues its decision, if necessary.⁴

3 If the Hearing Examiner rules partially in favor of BSRE and partially in favor of the
4 County, then, once the Court of Appeals ruling is issued, the parties may have to return to the
5 Hearing Examiner for a third hearing and subsequent ruling consistent with the Court of Appeals'
6 ruling on the Issues.

7 Finally, proceeding with the hearing before the Hearing Examiner prior to the Court of
8 Appeals issuing its decision may very well end up with a second simultaneous set of appeals on
9 the same issues. This could be avoided by receiving the Court of Appeals' ruling first, and then
10 allowing the parties to act in accordance with that ruling.

11 **IV. CONCLUSION**

12 BSRE has followed all of the applicable appeals procedures in order to have a decision
13 reached on the two legal interpretation Issues – that of the applicability of the residential zoning
14 setback and that of the available building heights where the property is located adjacent to a high
15 capacity transit route. The County, with full knowledge of the pending appeal, denied BSRE's
16 request to extend the deadline for submitting the revised Land Use Applications until after the
17 Court of Appeals issued its ruling, and is now trying, once again, to rush through the denial of the
18 revised Land Use Applications using the rarely invoked SCC 30.61.220.

19 The County refused to work with BSRE on the timing of the submittal of the revised Land
20 Use Applications, refused to provide even one comment letter before rushing to have the Land Use
21 Applications denied, and is now refusing to allow the hearing before the Hearing Examiner to be
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26 ⁴ BSRE previously requested that the County stay the Reactivation Deadline in order to prevent this exact
27 situation, so that the parties would have the legal interpretation on the Issues prior to BSRE revising and resubmitting
and the County reviewing the revised Land Use Applications. The County refused to grant BSRE any additional time.

1 stayed pending the Court of Appeals' decision. The County has simply refused to act in good faith
2 and is taking every step possible to put BSRE at a disadvantage.

3 In the interests of fairness, judicial economy and efficiency, BSRE respectfully requests
4 that the stay be granted to allow the parties to have an official legal interpretation of the Issues
5 before proceeding on the County's requested denial of the Land Use Applications because the
6 Court of Appeals' ruling would alter the scope of the hearing necessary as well as how BSRE
7 would respond to the County's stated areas of substantial conflict.
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9 Dated this 24th day of June, 2020.
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12 
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14 Jacques E. St. Romain, WSBA #44167
15 J. Dino Vasquez, WSBA #25533
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27

CERTIFICATE OF SERVICE

I, Heather L. Hatrup, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 701 Fifth Ave., Suite 3300, Seattle, WA 98101. On this day, I caused to be filed with Snohomish County Planning and Development Service a true and correct copy of the foregoing document. I caused the same to be served on the parties listed below in the manner indicated.

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Laura Kisielius
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Via U.S. Mail
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Via U.S. Mail
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Via Overnight Mail
CM/ECF via court's website

Executed on this 24th day of June, 2020, at Seattle, Washington.

/s/ Heather L. Hatrup

Heather L. Hatrup
Assistant to Jacque E. St. Romain

From: [Heather Hattrup](#)
To: [Davis, Kris](#); [Davis, Kris](#)
Cc: [Otten, Matthew](#); [Otten, Matthew](#); [Kisielius, Laura](#); [Jacque St. Romain](#); [Douglas A. Luetjen](#); [J. Dino Vasquez](#); [Gary Huff](#)
Subject: BSRE Point Wells, LP v. Snohomish County Planning and Development Services; 11-101457 LU
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Good afternoon,

Attached please find BSRE Point Wells, LP's Motion to Stay Hearing. A hard copy will follow via U.S. Mail.

Sincerely,
Heather Hattrup
Assistant to Jacque E. St. Romain

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